The plaintiff's book was entitled ORGEL ON VALUATION UNDER EMINENT DOMAIN.

The defendants' book was entitled EMINENT DOMAIN—VALUATION AND PROCEDURE—Alfred D. Jahr. Trial was before the Court (Dimock, *D.J.*) without a jury. An interlocutory judgment was rendered on March 30, 1960 in favor of the plaintiffs. The issue of damages was referred to Newman Levy, Esq. to hear evidence and to report the amount thereof. The Master filed a Report on the 14th day of July, 1960. Thereafter objections were filed to the said Report. The final judgment was entered on the 19th day of December, 1960 and in addition to an injunction awarded to the plaintiffs against the defendants jointly and severally the sum of $12,849.32, being the total of profits and royalties of the defendants; an additional sum of $10,000 as counsel fees; costs were taxed in the sum of $926.40. The Court allowed the Master a sum of $1,250. making the total costs $2,176.40 and the total judgment in the sum of $25,025.72.

The defendants appealed to the Court of Appeals for the Second Circuit which modified unanimously the judgment in the following particulars:

1. The Court of Appeals apportioned the profits in accordance with the relative contribution of the plagiarized material to the total work and allocated fifty percent of the profits instead of the one hundred percent allowed by the trial court; and

2. The Court reduced the amount of attorneys' fees from $10,000. to $5,000, and as so modified the Court below affirmed the judgment of the District Court.

POINT I

The Court below in the exercise of sound judicial discretion awarded fifty percent of the profits to the plaintiff. This presents no consideration requiring review under Rule 19 (b).

The statute by which this question of apportionment of profits is to be determined is found in the Copyright Law of the United States, Title 17 U.S.C., Section 101 (b).

The cases relied upon by the plaintiff *Callaghan* v. *Myers*, 128 U.S. 617 and *Belford, Clarke & Co.* v. *Scribner*, 144 U. S. 488 (pp. 9, 10 and 11 Petition) both arose under the Copyright Act of July 8th, 1870, prior to the Copyright Act of 1909 now in force substantially.

In *Sheldon* v. *Metro-Goldwyn Pictures Corp.*, 309 U.S. 390, this Court considered both *Callaghan* and *Belford* and distinguished them at length. This Court said:

> "We agree with petitioners that the 'in lieu' clause is not applicable here, as the profits have been proved and the *only question is as to their apportionment.*
>
> Petitioners stress the provision for recovery of 'all' the profits, but this is plainly qualified by the words 'which the infringer shall have made from such infringement.' This provision in purpose is cognate to that for the recovery of 'such damages as the copyright proprietor may have

suffered due to the infringement.' The purpose is thus to provide just compensation for the wrong, not to impose a penalty by giving to the copyright proprietor profits which are not attributable to the infringement.

Prior to the Copyright Act of 1909, there had been no statutory provision for the recovery of profits, * * *." (Emphasis supplied) (P. 399)

This Court then went on to say that in passing the Copyright Act the apparent intention of Congress was to assimilate the remedy with respect to the recovery of profits to that already recognized in patent causes and said:

"We shall presently consider the doctrine which has been established upon equitable principles with respect to the apportionment of profits in cases of patent infringement. We now observe that there is nothing in the Copyright Act which precludes the application of a similar doctrine, based upon the same equitable principles in cases of copyright infringement." (p. 401)

Following this the Court discussed at length *Callaghan* and *Belford* and said:

"We agree with the court below that these cases do not decide that no apportionment of profits can be had where it is clear that all the profits are not due to the use of the copyrighted material, and the evidence is sufficient to provide a fair basis of division so as to give to the copyright proprietor all the profits that can be deemed to have resulted from the use of what belonged to him. Both the Copyright Act and

> our decisions leave the matter to the appropriate exercise of the equity jurisdiction upon an accounting to determine the profits 'which the infringer shall have made from such infringement.' " (p. 402)
>
> * * * * *
>
> "The result to be accomplished 'is a rational separation of the net profits so that neither party may have what rightfully belongs to the other.' Id. 235 U.S. p. 647, 59 L. ed. 403, 35 S. Ct. 223.
>
> We see no reason why these principles should not be applied in copyright cases." (p. 404)

In citing *Callaghan* and *Belford* the petitioners here commit grave error.

The petitioners then cite *Sammons* v. *Larkin*, 38 Fed. Supp. 649, in the District Court of Massachusetts, and conclude following that citation:

> "Clearly, therefore, there is a conflict between the decision reached by the Court of Appeals with reference to the allocation of profits and the decisions of this Court." (Petition p. 11)

This statement by petitioner is utterly without foundation. There was no such conflict.

As to the basis of apportionment the Trial Court in its opinion, referring the computation to the Master, had stated that such copying as occurred was "in the compilation of the part of his work which dealt with valuation". The opinion further stated:

> "Orgel is an exhaustive treatment of one phase of eminent domain. Jahr purports to cover not only the phase covered by Orgel—Valuation—

but also the procedure in eminent domain. There is no charge that Jahr infringes Orgel in any respect other than the treatment of valuation." (pp. 44-45 Petition)

And the Special Master's Report followed with a statement that:

"It was established without dispute that the part alleged to have been plagiarized by Jahr constitutes about thirty-five percent of the Jahr book. (S.M. 285)." (Petition p. 45)

The Master further found with regard to the contention of the plaintiff that he was entitled to the entire profits:

"Unfortunately for this contention, the plagiarized and unplagiarized parts in the instant case *are* separable. Judge Dimock found that 'there is no charge that Jahr infringes Orgel in any respect other than the treatment of valuation.' Thirty-five percent of the Jahr book is conceded to be taken from the Orgel book. Therefore, for the purpose of this case, sixty-five percent of the Jahr book may be deemed to be original." (Petition p. 48)

Rule 53 (e) (2) of the Rules of Civil Procedure provides:

"In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous."

In this case the Master had taken some 389 pages of testimony and had received in evidence some 16 exhibits. The District Court nevertheless refused

to follow the rule and the Report of the Master and allowed the total net profits. In so doing the court disregarded the record which showed that the defendant's work:

> "* * * contains much more—sixty-five percent more—than the treatment of valuation. It contains a presentation of practice and procedure in eminent domain, and forms." (Record p. 542)

and the record before the Master, at which the plaintiff testified:

> "Q. Can you tell us roughly what percentage of the defendant's book deals with the subject of the law of valuation of eminent domain? A. About 35 percent." (S.M.P. 27)

Counsel for the plaintiff asserted (S.M.P. 42):

> "We only quoted 35 per cent or a certain portion with respect to valuation that is infringed. I think the question of number of cases should be limited to that particular question."

And again counsel for the plaintiff on his redirect examination of the plaintiff asked:

> "Q. Now, you were asked on cross-examination for a reference to a number of cases in this particular 35 percent of Jahr, referring to and claiming that it was copied from your book——
>
> The Court: Will you speak a little louder, Mr. Birdsall?
>
> Q. A number of cases appearing in that particular 35 percent as compared with the number of cases appearing in your sections on 'Valuation'." (S.M.P. 187)

On the trial counsel for the plaintiff objected to testimony dealing with other particulars of the book asserting that evidence should be admitted relating only to that portion of the book which was claimed to infringe plaintiff's book. In dealing with this the Court of Appeals said:

> "In cases such as this where an infringer's profits are not entirely due to the infringement, and the evidence suggests some division which may rationally be used as a springboard it is the duty of the court to make some apportionment." (Petition p. 64)

And the Court then pointed out that *Sheldon* had narrowly limited *Belford* and *Callaghan*, and that those decisions have no application "where it is clear that all the profits are not due to the use of the copyrighted material, and the evidence is sufficient to provide a fair basis of division."

The Court of Appeals further said:

> "In the instant case the plagiarized material appeared only in the section on Valuation, which comprises thirty-five percent of Jahr's work. The very existence of the remaining sixty-five percent in the infringing work is convincing evidence that some part of the commercial value of the whole is attributable thereto. We are not persuaded that the principle of apportionment, announced in Sheldon, must be limited to cases in which experts have testified with respect to the relative contributions of the plagiarized and original portions. Although the testimony of experts is often helpful it is at best little more than an educated guess, and not of such con-

pelling force that it is an essential element in every case.

* * * * *

Since valuation is the single most important issue in the bulk of condemnation litigation, we feel that it is reasonable to allocate 50% of the profits to the infringing material, although that makes up but approximately 35% of the defendants' complete work. The treatment of the nature and exercise of the power of eminent domain, parties, pleadings, jurisdiction and venue, methods of trial and review, and the sample forms provided, while useful and in some cases important are, after all, ancillary to the central issue in the vast majority of condemnation actions, that of valuation. Jahr, however, did undoubtedly perform a useful service in bringing these subjects together and treating them in one volume. We think the practitioners in this field would find the balance of the work needed and useful in approximately the same degree as the single most important portion, that on valuation derived from Orgel." (Petition pp. 65, 66)

There is no consideration requiring review under Rule 19 (b). There is neither a conflict with another Court of Appeals, nor has there been decided an important question of federal law which has not been settled by this Court. This case is clearly within *Sheldon*. The first question presented by the petitioners (Petition p. 6) clearly requires a negative answer.

POINT II

The Court of Appeals properly modified the sum allowed as counsel fee. There is no conflict of decision under Rule 19 (b).

Again an examination of authorities cited by the petitioners reveals a woeful lack of responsibility in that the authorities cited are irrelevant and not germane.

The case cited as being a specific holding of the Court of Appeals for the Second Circuit limiting its jurisdiction over allowances for counsel in copyright cases, *Hendricks* v. *Thomas Publishing Co.*, 242 Fed. 37, was decided in April 1917. Since that time the court has said in *Hartfield* v. *Peterson*, 91 F. 2d 998 (1937):

> "The allowance of $2,000 to complainant's attorneys as a counsel fee we have power to review. * * *"

And since that statement the Circuit Court of Appeals for the Second Circuit said in *Davilla* v. *Brunswick*, 94 F. 2d 567, (cert. den. 304 U.S. 572) (1938):

> "The court granted an allowance of $2000 as counsel fees. This was excessive. Counsel fees should be commensurate with the services necessarily rendered and the success obtained."

Again in *Sheldon*, supra, the Circuit Court of Appeals reduced the amount allowed for attorneys' fees.

That the fee allowed in this case was more than generous and if anything should have been further

reduced along with the allowance to the Master may be seen from a comparison of the amount of counsel fees and judgments in cases where judgment has been rendered for the plaintiff.

Fee Awards to Prevailing Plaintiffs

	Damages (or Profits)	Attorney's Fees
Universal Film Mfg. Co. v. Copperman, 212 F. 301, aff'd 218 F. 577, 2nd Cir.	368.00	250.00
S. E. Hendricks v. Thomas Pub. Co., 242 Fed. Rep. 37, 2nd Cir. (1917)	2,500.00	2,500.00
Stodart v. Mutual Film Corp., 249 Fed. 507 D. C., S. D. N. Y. (1917)	900.00 (later changed to $500)	300.00
M. Witmark & Sons v. Pastime Amusement Co., 298 Fed. Rep. 470 (1924)	250.00	100.00
Witmark v. Calloway, 22 F. 2d 412 (1927).	250.00	250.00
Buck v. Hezetis, 24 F. 2d 876 (1928)	250.00	50.00
Buck v. Lester, 24 F. 2d 877 (1928)	250.00	50.00
Buck v. Duncan; Same v. Jewell-La Salle Realty Co., 32 F. 2d 366 (1929)	250.00	100.00
Buck v. Milan, 32 F. 2d 622 (1929)	500.00	100.00
Schelberg v. Empringham, 36 F. 2d 991 (1929) Note: Payable by three defendants: $1,500 by Empringham; $750 by Bender; $250 by H. E. Soc.	8,000.00	2,500.00
Sebring Pottery Co. v. Steubenville Pottery Co., 9 F. Supp. 384 (1934)	2,500.00	1,800.00

	Damages (or Profits)	Attorney's Fees
Blackburn v. *Southern California Gas Co.*, 14 F. Supp. 553 (1936)	750.00	750.00
Freedman v. *Milnag-Leasing Corp.*, 20 F. Supp. 802 (1937)	2,000.00	1,000.00
Cory v. *Physical Culture Hotel*, 88 F. 2d 411 (1937)	5,000.00	2,500.00
Hartfield v. *Peterson*, 91 F. 2d 998 (1937)	5,000.00	2,000.00
Freedman v. *Milnag Leasing Corp.*, 20 F. Supp. 803 (1937)	2,000.00	1,000.00
Buck v. *Russo*, 25 F. Supp. 317 (1938)	500.00	100.00
Buck v. *Newsreel, Inc.*, 25 F. Supp. 787 (1938)	1,000.00	100.00
Buck v. *Ridgway Const. Co.*, 25 F. Supp. 690 (1938)	500.00	50.00
Buck v. *Spanish Gables, Inc.*, 26 F. Supp. 36 (1938)	250.00	100.00
Buck v. *Dacier*, 26 F. Supp. 37 (1938)	500.00	100.00
Buck v. *Sarola Restaurant*, 27 F. Supp. 289 (1938)	500.00	100.00
Davilla v. *Brunswick-Balke Collander Co.*, 94 F. 2d 567 C. C. A. 2nd Cir. (1938) Note: Award of $2,000 called excessive by Circuit Ct. certiorari denied, 304 U. S. 572.	1,057.73	1,000.00
Zenn v. *National Golf Review, Inc.*, 27 F. Supp. 732 (1939)	1,000.00	400.00
Buck v. *Lisa*, 28 F. Supp. 379 (1939)	250.00	50.00
Advertisers Exchange, Inc. v. *Laufe*, 29 F. Supp. 1 (1939)	1,250.00	150.00
Sheldon v. *Moredall Realty Corp.*, 29 F. Supp. 729 (1939)	3,099.14	1,500.00

	Damages (or Profits)	Attorney's Fees
Eliot v. *Ware-Marston, Inc.*, 30 F. Supp. 301 (1939)	500.00	250.00
Zuckerman v. *Dickson*, 35 F. Supp. 903 (1940)	1,250.00	100.00
Burndy Engineering Co. v. *Penn-Union Electric Corp.*, 36 F. Supp. 35 (1940)	4,000.00	1,000.00
Sammons v. *Larkin*, 38 F. Supp. 649 (1940)	7,664.99	1,500.00
Raymor Ballroom Co. v. *Buck*, 110 F. 2d 207 aff'g 29 F. Supp. 119 (1940)	500.00	100.00
Sheldon v. *Metro-Goldwyn Pictures Corporation*, 106 F. 2d 45, 309 U. S. 390 (1949)	587,604.37	10,000.00
Note: This case involved an accounting of profits which totalled $1,655,269.15. It was apportioned at $587,604.37 and ultimately reduced to $118,000. The fee stated was for preparation of trial and for the trial.		
Kraft v. *Cohen*, 38 F. Supp. 1022 (1941)	750.00	300.00
Buck, et al. v. *Cecere*, 45 F. Supp. 441 (1942)	250.00	100.00
Stonesifer v. *Twentieth Century-Fox Film Corp.*, 48 F. Supp. 196 aff'd 140 F. 2d 579 (1942).	3,960.00	1,000.00
Note: Total net profits were $19,800. Judgment by apportionment was $3,960. Citing Sheldon v. Metro-Goldwyn Pictures Corporation.		
Burndy Engineering Co. Inc. v. *Sheldon Service Corp.*, 127 F. 2d 661 (1942)	3,500.00	2,000.00
Note: Fees based on multifarious issues of law and fact.		

	Damages (or Profits)	Attorney's Fees
Adventures In Good Eating, Inc. v. Best Places To Eat, Inc., 131 F. 2d 809 (1942)	3,500.00	1,700.00
Sammons v. Colonial Press, Inc., 126 F. 2d 341 (1942)	7,486.00	1,500.00
Advertisers Exchange, Inc. v. Bayless Drug Store, Inc., 50 F. Supp. 169 (1943)	250.00	150.00
Law v. National Broadcasting Co. Inc., et al., 51 F. Supp. 798 (1943)	2,180.00	250.00
Rudolf Lesch Fine Arts, Inc. v. Metal, 51 F. Supp. 69 (1943)	1.00	300.00
Select Theatres Corp. v. The Ronzoni Macaroni Co., 59 U. S. P. Q. 288 (1943)	11,500.00	2,000.00
Remick Music Corp. v. Interstate Hotel Co., 58 F. Supp. 523 (1944)	4,750.00	2,400.00
Phillips v. The Constitution Publishing Co., 72 U. S. P. Q. 69 (1947)	250.00	250.00
Whitman Publishing Company v. Writesel, 83 U. S. P. Q. 535 (1949) Note: Special Counsel brought from New York was a specialist in field of copyright law.	10,850.00	1,500.00
Alfred Bell & Co. Ltd. v. Catalda Fine Arts, 86 F. Supp. 399 (1949). Modified on other grounds—191 F. 2d 99 Note: Fees proportioned among three separate defendants.	10,000.00	7,500.00
Toksvig v. Bruce Pub. Co., et al., 181 F. 2d 664 (1950)	1,000.00	500.00
F. W. Woolworth Co. v. Contemporary Arts, Inc., 193 F. 2d 162 (1951), aff'd 344 U. S. 228 (1952)	5,000.00	2,000.00

	Damages (or Profits)	Attorney's Fees
Malsed v. Marshall Field & Co., 96 F. Supp. 372 (1951)	100.00	500.00
Gordon v. Weir, 111 F. Supp. 117 (1953)	3,874.00	1,000.00
Barry Alter Co. v. A. E. Bordon Co., 121 F. Supp. 941 (1954)	6,500.00	1,000.00
Hollywood Jewelry Mfg. Co. v. Dushkin, 136 F. Supp. 738 (1955)	3,500.00	500.00
Royal v. RCA, 107 U. S. P. Q. 173 (1955)	510.00	150.00
M. J. Golden & Co. v. Pittsburg Brewing Co., 137 F. Supp. 455 (1956)	1,000.00	300.00
Nikanov v. Simon & Schuster Inc., 144 F. Supp. 375, aff'd 246 F. 2d 501 (1956)	5,000.00	1,000.00
Harms, Inc. v. Sansom House Enterprises, Inc., 162 F. Supp. 129 (1958)	1,000.00	250.00
American Visuals Corp. v. Holland, 261 F. 2d 652 (1958)	5,000.00	1,500.00
Dan Kasoff, Inc. v. Palmer Jewelry Mfg. Co. Inc.	3,000.00	1,500.00
Dan Kasoff, Inc. v. Max Alpern, et al., 171 F. Supp. 603 (1959)	1,500.00	750.00
Massapequa Publishing Co., Inc. v. Observer, Inc. et al., 191 F. Supp. 261 (1961)	250.00	250.00

A similar but not as extensive a table was published in the Copyright Law Revision Studies prepared for the Subcommittee on Patents, Trademarks and Copyrights of the Senate Committee on the Judiciary, Study No. 23, Table B, cited by the court below (Petition p. 67).

Following its citation of the Table of Fees the court said:

> "In the case at bar, while a substantial amount of time was spent by plaintiff's counsel, *much of it was necessitated by counsel's unfamiliarity with the field.*" (Emphasis supplied)

The District Court felt that much unnecessary work had been done and said:

> "While the number of hours spent on the case was great, the presentation excellent and the result successful, *I cannot shut my eyes to the fact that counsel were dealing with an unfamiliar subject* and *cannot fairly charge defendants for their education.*" (Emphasis supplied) (Petition p. 56)

And the Master in his Report quoted from the testimony of Mr. Birdsall:

> "Q. May I ask how many cases you have tried on copyright? A. One.
>
> Q. What case was that? A. The instant case.
>
> Q. The instant case? A. Yes.
>
> Q. May I suggest that a specialist, or a man knowing the field, might have spent less time? A. Yes, you may suggest it.
>
> Q. Would you accept that suggestion? A. Yes." (Petition p. 52)

The defendants here have been burdened with payment for an unnecessarily lengthy record and for unnecessary lengthy hearings before the Master. The unnecessary length was due solely to the inexperience of counsel for the plaintiffs. Assuming the testimony

of Mr. Birdsall that approximately fifteen hundred hours were spent on this case, analyzed that corresponds roughly to two hundred working days, excluding weekends and holidays, and would have meant a solid year of work excluding from consideration any other matters.

The Court below was generous in its allowance particularly when that allowance is compared with usual allowances for fees in copyright matters by the courts.

The District Court and the Court below were generous in making allowance to the Master for a record of some three hundred and ninety-one pages when the proof of the profits was contained in a three page exhibit. There is no reason why this defendant, a reputable law book publishing house, should have been so muleted.

In addition to the *Hendricks* case, supra, this petitioner has cited what he calls similar decisions (Petition p. 12). None of these decisions involve the Copyright Statute or analagous statutes.

Mercantile-Commerce Bank & Trust Co. v. *Southeast Arkansas Levee District*, 106 Fed. 2d 966, involved the fixing of fees in a bankruptcy matter.

Lackner v. *Illinois Bell Telephone Co.*, 111 Fed. 2d 136 (cert. den. 311 U.S. 652), involved fixing of attorneys' fees on a petition for reduction of telephone rates.

U.S. v. *Anglin & Stevenson*, 145 Fed. 2d 622 (cert. den. 324 U.S. 844) fixed a fee in the matter under an Indian inheritance fund.

The decision of the court below was consonant with its previous decisions, including those which had been upheld by this Court. There is no question presented by petitioners' question B (Petition p. 6).

POINT III

Neither with regard to the apportionment of profits nor the allowance of counsel fees has the Court of Appeals rendered a decision in conflict with the decision of another Court of Appeals on the same subject, nor has it decided any important question of federal law which has not been settled by this Court.

Wherefore, your respondents pray that this Petition be denied.

Respectfully submitted

PHILIP WITTENBERG
EDWARD W. STITT, JR.
Counsel for Respondents.